

ESTATE OF ELMER JAMES WHIPPLE

IBIA 88-25

Decided September 27, 1988

Appeal from an order after remand issued by Administrative Law Judge Elmer T. Nitzschke in Indian Probate IP TC 255S 83.

Docketed and dismissed.

1. Administrative Procedure: Generally--Appeals--Indian Probate:
Appeal: Generally--Indians: Generally

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that even assuming everything the appellant alleges is true, under no set of circumstances can the appellant prevail, the notice will be addressed without additional briefing.

2. Indian Probate: Appeal: Timely Filing

An order on rehearing entered in the probate of a deceased Indian's trust or restricted estate is final if no timely appeal is filed.

3. Indian Probate: Reopening: Standing to Petition for Reopening

An adult who participated in the original probate hearing into a deceased Indian's trust or restricted estate lacks standing to petition for reopening.

APPEARANCES: Shirley Rae Whipple for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On April 21, 1988, the Board of Indian Appeals (Board) received a notice of appeal from Shirley Rae Whipple on behalf of her sister Theresa Faye Whipple (appellant). The notice of appeal was filed after issuance of a March 4, 1988, order after remand by Administrative Law Judge Elmer T. Nitzschke in the estate of Elmer James Whipple (decedent). This appeal is hereby docketed under Docket No. IBIA 88-25. For the reasons discussed below, the Board dismisses the appeal.

Background

The background of this case is fully set forth in the Board's initial decision. Estate of Elmer J. Whipple, 15 IBIA 273 (1987). Only those facts necessary to the resolution of the present appeal will be repeated here.

Decedent, Santee Sioux 382-U01117, was born on February 17, 1906, and died on November 12, 1982. A hearing to probate his trust or restricted estate was held before Administrative Law Judge Vernon J. Rausch on October 12, 1983. As a result of that hearing Judge Rausch issued an order on June 22, 1984, finding that neither Shirley nor appellant were decedent's children.

Shirley filed a petition for rehearing with Judge Rausch, who held a second hearing on October 24, 1985. This hearing was specifically addressed to the question of whether Shirley was decedent's daughter. By order dated February 26, 1987, Judge Rausch repeated his original determination that decedent was not Shirley's father. 1/ Shirley appealed this decision to the Board, which on September 1, 1987, vacated Judge Rausch's decision and, noting that testimony should have been sought from Shirley's mother, Pauline Whipple, remanded the case for the taking of further evidence concerning Shirley's paternity. Whipple, supra.

Unfortunately, Pauline died a few months before the Board's remand order was issued. Therefore, Judge Nitzschke 2/ took further evidence concerning Shirley's paternity in the hearing held to probate Pauline's estate. In a March 4, 1988, order after remand, Judge Nitzschke determined there was insufficient evidence to overcome the legal presumption that a child born during marriage is legitimate. Accordingly, he amended Judge Rausch's June 22, 1984, and February 26, 1987, orders in decedent's estate to include Shirley as an heir of decedent. No appeal has been taken from this determination.

Discussion and Conclusions

The present appeal was filed by Shirley on behalf of appellant seeking a determination that appellant is also the child of decedent.

[1] Normally, appellants before the Board are given a briefing schedule in accordance with the provisions of 43 CFR 4.311. However, in this case, the facts asserted by appellant in her notice of appeal and contained in the probate record, as discussed below, show that even assuming everything appellant alleges is true, there is no set of circumstances under which she can

1/ Judge Rausch also confirmed his original determination that decedent was not appellant's father. However, the appeal filed from the Feb. 26, 1987, order by Shirley and the subsequent remand proceedings, discussed infra, were addressed only to a determination of Shirley's paternity.

2/ Because of a realignment of Indian probate jurisdictions within the Office of Hearings and Appeals, Department of the Interior, Judge Nitzschke conducted the proceedings on remand.

prevail in this appeal. Therefore, the Board issues this decision without briefing. See Estate of Richard Lip, 15 IBIA 97 (1987).

[2] Duly promulgated Departmental regulations in 43 CFR 4.320(a) require the filing of a notice of appeal within 60 days from the date of the Administrative Law Judge's order on rehearing. A timely appeal was filed with the Board by Shirley, who sought review only of the determination that decedent was not her father. ^{3/} The additional proceedings on remand resulted from Shirley's appeal and were concerned solely with the question of whether or not decedent was Shirley's father. Appellant, however, who was present at the first hearing in decedent's estate on October 12, 1983, did not file a petition for rehearing of Judge Rausch's June 22, 1984, order determining heirs or an appeal from his February 26, 1987, order on rehearing, both of which found that decedent was not her father. Accordingly, when appellant failed to file a timely appeal from Judge Rausch's orders, they became final as to her. See Estate of Ralph James (Elmer) Hail, 12 IBIA 62 (1983).

[3] Furthermore, appellant has no right to seek reopening of this estate. Under 43 CFR 4.242, governing reopening of Indian probate estates, the petitioner must show that he or she "had no actual notice of the original proceedings." Appellant not only had actual notice of the original proceedings, she was an adult and attended the initial hearing. Accordingly, she lacks standing to petition for reopening. Lip, supra, and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

^{3/} In its Sept. 1, 1987, decision in this case, the Board specifically noted that Shirley was the only appellant before it. In footnote 2 to its decision, 15 IBIA at 274, the Board stated: "Theresa has not appealed the determination that decedent was not her father."